No. 87-1341

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In the Supreme Court of the United States

OCTOBER TERM, 1987

BROWN COMPANY, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board properly declined to defer to an award of a bipartite grievance committee in determining that the transfer of work out of a bargaining unit violated the National Labor Relations Act, 29 U.S.C. 151 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D1-D2) is reported at 833 F.2d 1015 (Table). An earlier opinion of the court of appeals (Pet. App. B1-B33) is reported at 663 F.2d 1078 (Table). The supplemental decision and order of the National Labor Relations Board (Pet. App. C1-C11) is reported at 278 N.L.R.B. No. 113. The original decision and order of the National Labor Relations Board (Pet. App. A1-A20), together with the findings and recommendations of the administrative law judge (Pet. App. A21-A70), is reported at 243 N.L.R.B. 769.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1987. The petition for a writ of certiorari was filed on February 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Livingston-Graham Division (Livingston-Graham) of petitioner Brown Company (Brown), manufactures and transports rock, sand, gravel, and ready-mixed concrete products (Pet. App. A1). Prior to January 1976, Livingston-Graham employed 12 drivers and operated seven "cement trains"—*i.e.*, tractor-trailer trucks specially designed for the hauling of bulk cement (*id.* at A2). The cement trains principally delivered cement from various cement companies to Livingston-Graham's own manufacturing facilities (*ibid.*). On some occasions, however, Livingston-Graham leased its cement trains (with drivers) to cement companies and hauled cement to other customers of the cement companies—a so-called "for-hire" arrangement (*ibid.*).

Livingston-Graham's 12 cement train drivers were represented, along with some 200 other Livingston-Graham employees, by Building Material & Dump Truck Drivers Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 420) (Pet. App. A2). Accordingly, they were covered by the "blue book" contract between Rock Products and Ready Mixed Concrete Employers of Southern California, a multiemployer bargaining association, and a number of Teamsters locals, including Local 420 (*id.* at A2, A21, A27). Among other things, the blue book contract required member employers such as Livingston-Graham to protect, where possible, work performed by employees in the bargaining unit (*id.* at C3-C4 n.6).[1]

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[1] Article XIX of the blue book contract, entitled "Job Protection," stated that "[i]t is the intent of the parties to this Agreement to protect the work performed by employees in the bargaining unit" (Pet. App. C3-C4 n.6). It stated that "it is important and desirable to utilize [the

In the spring of 1975, one of Livingston-Graham's competitors, Con Rock, formed a satellite cement hauling company that, pursuant to its own "for-hire" collective bargaining agreement with various Teamsters locals, including Local 420, paid substantially lower wage rates than were provided by the blue book contract (Pet. App. A2-A3). Prompted by this, in the summer of 1975, Livingston-Graham's Vice President Anton Dyck informed Oliver Traweek, the Secretary-Treasurer of Local 420, that Livingston-Graham intended to form a new "for-hire" cement hauling company, called L-T Transport, Inc. (L-T Transport), and to transfer its cement trains, as well as the cement trains of the Tri-City Division of Brown (Tri-City), to L-T Transport (*id.* at A3). Dyck told Traweek that Livingston-Graham would allow its incumbent cement train drivers to transfer to L-T Transport without loss of seniority, but only if Local 420 agreed to replace the blue book contract with a "for-hire" agreement that provided the drivers with lower wage rates (*id.* at A3, A28, A34). Traweek responded that Local 420 would sign such a for-hire agreement if the drivers it represented authorized it to do so (*id.* at A3, A37-A38). Despite efforts by Dyck and Local 420 officials, however, the Livingston-Graham drivers voted against the proposed agreement (*id.* at A3).

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employer's] own equipment and drivers to the greatest extent possible prior to using sub-haulers and/or non-Company trucks" (*ibid.*). It further stated, however, that, under "certain conditions, such as those dictated by customer demands, equipment requirements, daily dispatch determinations, materials to be hauled and similar factors," the employer would have to use sub-haulers and/or non-company trucks (*ibid.*). It thus prohibited the employer only from using sub-haulers and/or non-company trucks "as a subterfuge to defeat the protection of the bargaining unit work" (*ibid.*).

Local 420 therefore refused to sign the proposed "for-hire" agreement (Pet. App. A3). At the same time, however, Teamsters Locals 467 and 871, which had jurisdiction over locations where Tri-City conducted its operations, signed such agreements,[2] and Tri-City's drivers were given the first opportunity to transfer to L-T Transport (*id.* at A3-A4). No such invitations were extended to Livingston-Graham's employees (*id.* at A4). As a consequence, after Livingston-Graham transferred all of its cement trains to Tri-City's Redlands location and L-T Transport began hauling cement (using drivers formerly employed by Tri-City and represented by Locals 467 and 871), Livingston-Graham told its 12 drivers that they would have to exercise their seniority rights to bump into other Livingston-Graham jobs, or be laid off (*ibid.*). Nine did so, but three drivers, including Kris Borum, had insufficient seniority to bump and were laid off for several months (*ibid.*).

Borum and several other former Livingston-Graham drivers responded by filing grievances protesting the transfer of work to L-T Transport (Pet. App. A4). On February 19, 1976, a bipartite grievance committee, consisting of three representatives from union signatories to the blue book contract and three representatives from the employer association, heard the grievance (*ibid.*). The union representatives, who were selected by Traweek, included a representative of Local 871, a local that had signed a "for-hire" agreement with L-T Transport and

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[2] Some of Tri-City's employees, including its cement train drivers, were represented by Teamsters Local 467, and covered by the "orange book" contract (Pet. App. A3, A13). The remainder of Tri-City's employees were represented by Teamsters Local 871. Although Local 871 was a blue book signatory, those employees were covered by the orange book under a special agreement between the Union and Tri-City (*id.* at A21, A28-A29).

some of whose members had transferred into positions formerly held by Livingston-Graham drivers (*ibid.*).[3] The management representatives were the retiring industrial relations director for the employer association, his successor, and a representative of Sully-Miller, another party to the blue book contract that had set up a "for-hire" hauling company (*id.* at A32, A53). After receiving evidence from the grievants and the employer, the grievance committee met in executive session and summarily denied the grievance (*id.* at A4-A5).[4]

2. After Borum filed unfair labor practice charges with the National Labor Relations Board, the General Counsel of the Board issued a complaint alleging that Brown and its subsidiaries had violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1), (3), and (5), by transferring the cement trains from Livingston-Graham to L-T Transport during the term of the collective bargaining agreement with Livingston-Graham, and by laying off or requiring Livingston-Graham drivers to bump into other classifications as a result of the transfer of cement train work (Pet. App. A5, B26). An administrative law judge (ALJ) held a hearing with respect to this complaint and recommended that it be dismissed (*id.* at A21-A70). The ALJ reasoned that the grievance committee's procedures were fair and regular and, accordingly, that the Board should defer to the grievance committee's decision (*id.* at A68-A69).

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[3] Traweek was the presiding co-chairman of the committee, although he did not participate in the deliberations or vote on the grievance (Pet. App. A4).

[4] Under the contractual procedures, if the committee reached a decision, it was final and binding. If a decision was not reached, an arbitrator was to be appointed. Pet. App. A49.

The Board, with two members dissenting, disagreed (Pet. App. A1-A20). Citing *Spielberg Mfg.*, 112 N.L.R.B. 1080 (1955), it noted that, "[i]n determining whether it will honor the award of an arbitrator or an arbitration panel in deciding an unfair labor practice case, the Board looks to see whether the arbitration proceedings appear to have been fair and regular, whether all parties to the proceedings have agreed to be bound by the arbitration award, and whether the arbitration decision is not clearly repugnant to the purposes and policies of the Act" (Pet. App. A5 (footnote omitted)). It added that, while the Board has deferred to the awards of bipartite committees sitting without a neutral, it has not done so "where it appears that members of the committee have interests which are directly in conflict with those of the grieving party" (*ibid.*). The Board then found that such a direct conflict existed in this case (*id.* at A5-A6), pointing out that, prior to the grievance hearing, Local 871 had signed a for-hire agreement with L-T Transport, that some of Local 871's members had filled jobs formerly held by the grievants, and that the interests of all three management representatives were antithetical to those of the grievants (*ibid.*).[5] Accordingly, it concluded that deferral to the grievance committee's decision would be inappropriate (*id.* at A6-A7 & n.3).

The Board also disagreed with the ALJ's conclusion that "the legality of [petitioners'] actions here depends on an interpretation of the contract which can best be made by the grievance committee as an extension of the collective-bargaining process" (Pet. App. A7). Rather, the Board

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[5] The Board added that there was little evidence concerning the substance of the grievance committee's deliberations; that the committee apparently did not consider the unfair labor practice issue presented to the Board; and that "the positions of the Union and the grievant, Borum, were not in harmonious accord" (Pet. App. A7 n.3).

said, "[petitioners'] actions must be judged by their conformity with statutory law" (*ibid.*). In this regard, it noted that the "unilateral removal of bargaining unit work during a contract term is the type of contract modification proscribed by the Act, regardless of economic justification" (*ibid.*), and that such a "modification can be implemented only with the consent of the other party" (*id.* at A8 (footnote omitted)). The Board then found that, "[i]n the instant case[,] it is clear that Local 420 agreed to sign the for-hire agreement only with the authorization of the concerned employees, which was not forthcoming" (*ibid.*); that Livingston-Graham moved its cement trucks to L-T Transport "for the sole purpose of escaping from its wage obligations under the existing collective-bargaining contract" (*ibid.*); that, "[b]y transferring its trucks to L-T [Transport], [petitioner] thus did partially abrogate the existing blue book contract with Local 420" (*ibid.*); and that Local 420's failure to challenge the decision of the grievance committee or to file a charge with the Board did not establish its consent to the unilateral transfer (*id.* at A9). Accordingly, the Board concluded that the transfer of the cement trains and the consequent loss of bargaining unit work was " 'inherently destructive of employee interests' " and in violation of Section 8(a)(3) of the Act (Pet. App. A8-A9 (footnote and citation omitted)).

3. The court of appeals, with one judge dissenting, remanded the case to the Board (Pet. App. B1-B33). It determined that the standard applied by the Board for deferring to the grievance committee's decision was "not inconsistent with the Board's prior decisions" (*id.* at B10). Moreover, it determined that the "Board did not abuse its discretion in declining to defer to the committee's decision" (*id.* at B12 (footnote omitted)), finding (as did the Board) that a majority of the members of the grievance committee appeared to have interests directly in conflict with those of the grievant (*id.* at B10-B12), and that the

Union's decision to abide by the committee's decision did not preclude the employees from protesting the employer's unilateral change in the terms and conditions of their employment (*id.* at B15 n.2). But the court disagreed with the Board's conclusion that resolution of the merits of the unfair labor practice charge did not require interpretation of the collective bargaining agreement (*id.* at B12), noting that petitioner contended that the contract's language, "industry practice, past practice, the statements of the parties, and the law of the shop" would establish that it had not violated the agreement (*id.* at B13). It thus concluded that "the initial determinaton must be whether the [employer] was given the right under the terms of the collective bargaining agreement to transfer the cement train work from Livingston-Graham to L-T [Transport] for the purpose of paying a lower wage scale to its cement train drivers" (*ibid.* (footnote omitted)), and it remanded the case so that such a determination could be made (*id.* at B14).

4. On remand, the Board modified its prior decision and order and held that petitioners had violated Section 8(a)(5) of the Act (Pet. App. C1-C12). The Board reaffirmed its prior judgment not to defer to the decision of the joint committee (*id.* at C3). Then, after noting that no party had requested that it remand the contract issue to a new joint labor-management grievance committee (*id.* at C3 n.5), it determined that, while the blue book contract contemplates that non-unit employees will be used in certain situations, neither it nor industry practice or past practice of the parties authorized "Livingston-Graham to eliminate an entire job classification and transfer all cement hauling work out of the bargaining unit" (*id.* at C5, C6-C7). Finally, the Board found that Livingston-Graham's transfer of the cement hauling work "for the sole purpose of escaping from its wage obligations under the existing collective-bargaining contract" was a mid-

contract modification with respect to a mandatory subject of bargaining (*id.* at C7-C9),[6] and that the Union had not consented to this unilateral modification of the contract (*id.* at C8-C10).[7] Accordingly, it held that petitioners' conduct violated Section 8(a)(5) of the Act and, furthermore, that no finding with respect to the Section 8(a)(3) charge was necessary (Pet. App. C10).[8]

5. By memorandum order, the court of appeals affirmed the Board's decision and enforced its remedial order (Pet. App. D1-D2). The court remanded the case for compliance proceedings consistent with its judgment (*id.* at D2).

ARGUMENT

The decison below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is unwarranted.

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[6] In finding that the transfer related to a mandatory subject of bargaining, the Board relied (Pet. App. C4, C7-C8) on its decisions in *Milwaukee Spring Div.*, 268 N.L.R.B. 601 (1984), enforced *sub. nom. International Union, UAW Local 547* v. *NLRB*, 765 F.2d 175 (D.C. Cir. 1985), and *Otis Elevator*, 269 N.L.R.B. 891 (1984), in which the Board held that the transfer of work based on considerations of labor cost, as opposed to considerations respecting the nature or direction of the business, is a mandatory subject of bargaining.

[7] The Board noted that it is "settled Board policy that bargaining history will establish a waiver of the right to bargain on a mandatory subject only if * * * '[in] prior negotiations * * * the matter was "fully discussed" and * * * the Union * * * clearly and unmistakably waived its interest in the matter' " (Pet. App. C9 (citation omitted)). The Board found that Local 420's actions did not constitute such a full discussion or clear and unmistakable waiver (*id.* at C9-C10).

[8] As a remedy, the Board ordered (Pet. App. A12, C11) that the cement train trucks be transferred back to their Livingston-Graham locations; that the Livingston-Graham drivers be reinstated with backpay; and that Local 420 continue to be recognized as their bargaining representative.

1. Section 10(a) of the Act, (29 U.S.C. 160(a)), provides that the Board's authority to prevent persons from engaging in unfair labor practices is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Accordingly, this Court has long held that, although the Board may in its discretion elect to defer to arbitral processes, it is not compelled to do so when an unfair labor practice has allegedly been committed and, indeed, where an unfair labor practice question requires an initial determination as to the meaning and scope of a contract, the Board's determination takes precedence over an arbitral award enforcing private contract rights. See *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 271-272 (1964); *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 436-437 (1967); *NLRB* v. *Strong*, 393 U.S. 357, 360-362 (1969). Accord *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 50 (1974). On this authority, the Board has established a policy of deferring to arbitral decisions only where (1) the arbitrator's decision is not clearly repugnant to the purposes and policies of the Act; (2) the arbitration procedures are fair and regular; (3) the parties have previously agreed to be bound by the arbitrator's decision; and (4) the arbitrator has considered and decided the unfair labor practice issue presented to the Board. See *Spielberg Mfg.*, 112 N.L.R.B. 1080, 1082 (1955); *Olin Corp.*, 268 N.L.R.B. 573, 573-574 (1984).

The decision in this case follows from the routine application of these well-established principles. Citing *Spielberg*, the Board recognized that it defers to arbitral judgments only where "the arbitration proceedings appear to have been fair and regular, * * * all parties to the proceedings have agreed to be bound by the arbitration award, and * * * the arbitration decision is not clearly repugnant to the purposes and policies of the Act" (Pet. App. A5

(footnote omitted)). Applying these standards, the Board, upheld by the court of appeals, found (*id.* at A5-A6) that, in the instant case, the grievance committee's proceedings were not "fair and regular" (since the bipartite panel appeared to have been " 'arrayed in common interest against the individual grievant' " (*id.* at B9 (citation omitted)). The Board has reached identical conclusions in cases arising out of similar facts (see, *e.g.*, *Herman Bros.*, 252 N.L.R.B. 848, 853 (1980), aff'd, 658 F.2d 201, 207 (3d Cir. 1981); *Youngstown Cartage Co.*, 146 N.L.R.B. 305, 308 n.4 (1964)), and, in any event, such a fact-bound decision does not warrant review by the Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[9]

2. Contrary to petitioners' contention (Pet. 14-20), the decision below does not conflict with any decision of this Court. Neither the *Steelworkers* trilogy[10] nor *United Paperworkers Int'l Union* v. *Misco*, No. 86-651 (Dec. 1, 1987), addresses whether or to what extent the Board must defer to the arbitral process in deciding unfair labor prac-

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[9] Petitioners plainly err in suggesting (Pet. 14-15) that the Board found only that "some of the decision-makers were somehow generally 'interested' in the outcome." The Board, upheld by the court of appeals, found a direct and clear conflict of interest on the part of one of the union's representatives and all of management's representatives. See Pet. App. A5-A7.

Petitioners also err in asserting (Pet. 15) that the Board should have viewed the committee proceedings as an extension of the bargaining process and therefore binding, "even if 'interested' persons participated in that bargaining process." This assertion simply takes issue with the Board's contrary finding, upheld by the court of appeals, that Local 420 did not consent to a mid-term modification of the contract. See Pet. App. C8-C10.

[10] *United Steelworkers* v. *American Mfg.*, 363 U.S. 564, 566 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-598 (1960).

tice questions; they are concerned with the extent to which a *court* must defer to the arbitral process in resolving a contract dispute arising under Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185. Indeed, in *NLRB* v. *Acme Industrial Co., supra*, the Court made clear that the rule of deference established in the *Steelworkers* trilogy does not apply to the Board; the Court reasoned that "[t]he relationship of the Board to the arbitration process is of a quite different order" and that the Board's authority to deal with threshold contractual issues in the course of resolving unfair labor practice disputes is informed by provisions of the Act "that do not apply to the power of the courts under § 301" (385 U.S. at 436-437 (footnote omitted)). See also *NLRB* v. *Strong*, 393 U.S. at 360-361; *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 428 (1967); *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. at 272.

3. Petitioners similarly err in suggesting (Pet. 20-25) that the Board must in any event give weight to the grievance committee's interpretation of the contract and that its refusal to do so in this case is inconsistent with the holdings of various courts and other decisions of the Board. If the Board is not required to defer to the grievance committee's award because of potential bias on the part of committee members, it makes no sense to suggest that it must give weight to the grievance committee's interpretation of the contract; the potential bias of the grievance committee renders its actions unusable for all purposes. The decisions of the courts of appeals that petitioners cite are not to the contrary.[11] Nor are the decisions

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[11] In *NLRB* v. *Wilson Freight Co.*, 604 F.2d 712, 722-723 (1979), cert. denied, 445 U.S. 962 (1980), the First Circuit in fact held that the Board properly refused to defer to an arbitral award that upheld a discharge decision, reasoning that the contractual issue was not dispositive of the unfair labor practice issue; while the court said that the Board could not ignore the arbitral panel's interpretation of the

of the Board.[12]

4. Finally, there is no merit to petitioners' contention (Pet. 27-30) that this case presents an appropriate vehicle for resolving the "intercircuit confusion" that concerned the dissenting Justices in *Schaefer* v. *NLRB*, 464 U.S. 945, 947 (1983). That confusion related to the circumstances in which the Board would defer to a private settlement that did not fully remedy an unfair labor practice; neither the

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contract, it did not suggest that the Board would have to follow such an interpretation where the arbitral proceedings have not been fair and regular. Similarly, in *Fournelle* v. *NLRB*, 670 F.2d 331, 342-344 (1982), while the District of Columbia Circuit held that the Board must give binding weight to the interpretation of an arbitrator in an unrelated proceeding, even though the contract did not explicitly provide that arbitrators' decisions are binding precedents in subsequent arbitrations, it did not suggest that the Board must give any weight to an arbitral award rendered in proceedings that were not fair and regular. Finally, the remaining decisions—*Shores* v. *Peabody Coal Co.*, 831 F.2d 1382 (7th Cir. 1987); *DeSoto* v. *Yellow Freight Systems, Inc.*, 811 F.2d 1333 (9th Cir. 1987); *Toyota of Berkely* v. *Automobile Salesman's Local 1095*, 834 F.2d 751 (9th Cir. 1987); *Sheet Metal Workers Int'l Ass'n* v. *Kinney Air Conditioning Co.*, 756 F.2d 742 (9th Cir. 1985), and *La Mirada Trucking, Inc.* v. *Teamsters Local 166*, 538 F.2d 286, 288 (9th Cir. 1976), cert. denied, 429 U.S. 1062 (1977)—involved the relationship of courts to the arbitral process, not the relationship of the Board to that process; and, in any event, they do not suggest that the courts, much less the Board, must defer to an arbitral award that is rendered by a biased arbitrator.

[12] In *Bailey Distributors*, 278 N.L.R.B. No. 17 (Jan. 21, 1986), slip op. 9-10, rev'd on other grounds *sub nom. Nevins* v. *NLRB*, 796 F.2d 14 (2d Cir. 1986), the Board found that a neutral umpire had acted impartially; that the alleged animosity between the attorneys for the union and the grievant had no effect on the arbitration; and that the proceedings, in fact, had been fair and regular. Neither *Cincinnati Local 271, Lithographers*, 204 N.L.R.B. 418 (1973), *Reichold Chems.*, 275 N.L.R.B. 1414, 1416 (1985), nor *Pinkerton's, Inc.*, 270 N.L.R.B. 27, 27 n.1, 31 (1984), involved any question relating to the fairness of the arbitral proceedings.

courts of appeals nor the dissenting Justices raised any question concerning the circumstances in which arbitral proceedings would be considered so unfair or irregular that deference is inappropriate. On the contrary, on that score, the Board has consistently held that deference is not appropriate where, as here, a bipartite grievance/arbitration award is rendered by a panel whose members are not impartial, and no court has questioned the propriety of that rule.[13]

[13] Petitioners' reliance (Pet. 28) on *William E. Arnold Co.* v. *Carpenters Dist. Council*, 417 U.S. 12 (1974), is misplaced. In *Arnold*, the Court noted with approval (417 U.S. at 16) the Board's policy of deferring to the parties' voluntary methods of settlement only where the arbitral "proceedings appear to have been fair and regular." See, *e.g.*, *Collyer Insulated Wire*, 192 N.L.R.B. 837, 841 (1971); *The Associated Press*, 199 N.L.R.B. 1110, 114 (1972).

CONCLUSION

This petition for a writ of certiorari should be denied.

Respectfully submitted.

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